IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 17 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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KHEMA VIRA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MS BANNA S DUTTA for Appellant(s) : 1 - 2.
MR H.L. JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 06/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 The appellants – original accused came to be tried by the learned Addl. Sessions Judge, Mehsana, Camp – Patan in Sessions Case No. 27 of 1999. By judgment and order dated 5th March, 1998, appellant no. 1 was convicted for the offences punishable u/s. 302 & 324 of the Indian Penal Code, 1860 (for short, "the IPC") while appellant no. 2 was convicted for the offence punishable u/s. 302 r/w. Section 34 of IPC. For conviction u/s. 302 of IPC, appellant no. 1 was sentenced to undergo Rigorous Imprisonment for life with fine of Rs.500/- and in default of payment of fine, further Rigorous Imprisonment for six months; and, for the offence punishable u/s. 324 of IPC, he was ordered to undergo Rigorous Imprisonment for six months with fine of Rs.100/- and in default of payment of fine, Simple Imprisonment for further fifteen days. Both the sentences were ordered to run concurrently. So far as appellant no. 2 is concerned, for conviction u/s. 302 r/w. Section 34 of IPC, he was sentenced to undergo Rigorous Imprisonment for life with fine of Rs.500/- and in default of payment of fine, Simple Imprisonment for six months.

2.0 The short facts of the prosecution case are as under;

On 27.09.1996 at around 9.30 p.m. in the Chamarvas

area of Unjha Town of Mehsana District, while victim – Somabhai Malabhai Chamar was passing near the house of the appellants, at that time, the appellants came out from their house with deadly weapons in their hands, i.e. knife and "rampuri chappa" and, thereafter, started assaulting the victim and inflicted several blows on various parts of the body of the victim with the said weapons. As a result of the said injuries, the victim fell down. On noticing the same, the complainant - Naginbhai Malabhai Chamar and his son – Bharatbhai Naginbhai Chamar, ran to the scene of offence and tried to intervene in the scuffle. In that process, Bharatbhai Naginbhai Chamar sustained bodily injuries and since a crowd started gathering at the spot, the appellants ran away from the scene of offence along with the weapons in question. Thereafter, the victim and injured Bharatbhai Naginbhai Chamar were taken to the Cottage Hospital, Unjha where on examination, the Doctor declared the victim as 'dead' whereas, Bharatbhai Naginbhai Chamar was given necessary medical treatment.

2.1 Since it was a medico-legal case, the Doctor informed Unjha Police Station about the said incident and the P.S.O. noted down the same in the Station Diary. Thereafter, the P.S.O.

informed the same to P.S.I. Mr. Patel and the P.S.I. went to the Cottage Hospital at Unjha for carrying out necessary investigation. The P.S.I. inquired about the incident from Naginbhai Malabhai Chamar and recorded a complaint to that effect and sent the same along with the Report to Unjha Police Station for the purpose of registering the offence. On receipt of the same, the P.S.O. of Unjha Police Station registered the offence as Unjha Police Station I - C.R. No. 252 of 1996 under Sections 302, 324 & 114 of IPC as well as Section 135 of the Bombay Police Act, 1951 and, thereafter, the P.S.O. handed over the Report and the F.I.R. to P.S.I. Mr. Patel for further investigation. P.S.I. - Mr. Patel kept the said documents in the investigation file. Thereafter, the I.O. made necessary arrangements for the purpose of protecting the scene of offence and also for maintaining law and order in the said area.

2.2 In the meanwhile, at about 00.45 a.m., appellant no. 1 came to Unjha Police Station with the deadly weapon – knife. He was arrested in the presence of the 'Panchas'. The weapon was seized and, thereafter, a 'Panchnama' with respect to the said weapon as also the clothes that were worn by him at that point of time was drawn and the said items were then taken into custody

as 'muddamal' articles. At that time, appellant no. 1 also filed a complaint against the other side, which was recorded as Unjha Police Station I - C.R. No. 253 of 1996 under Sections 324, 323 and 114 of IPC and Section 135 of the Bombay Police Act, 1951. Thereafter, the P.S.I. again went to Cottage Hospital, Unjha and prepared the Inquest 'Panchnama' and also filled up the 'Marnottar' form and sent the dead body of the deceased for Post-mortem along with the Inquest 'Panchnama', 'Marnotarr' form and the 'Yaadi'. On receipt of the same, Dr. Jaishreeben Khushalbhai Patel, who was on duty as a Medical Officer at the relevant point of time, performed the Post-mortem on the body of the deceased. She also handed over the clothes which the deceased had worn at the time of the incident to the police authorities.

2.3 It may be noted that the shirt, which the deceased had worn at the time of the incident, had been seized by way of a 'Panchnama' prior to sending the dead body for Post-mortem and so far as the other clothes were concerned, the same were also seized by way of a separate 'Panchnama'. Thereafter, the P.S.I. went to the scene of offence and prepared a 'Panchnama' in presence of the 'Panchas' and also seized the 'muddamal' from

the scene of offence. Statements of several witnesses were also recorded. On the next day, i.e. on 29.09.1996, in the evening, at about 4.00 p.m., appellant no. 2 surrendered himself before Unjha Police Station with the weapon - "rampuri chappa". After preparing a 'Panchnama' of the weapon seized and the clothes worn by appellant no. 1 at the time of the incident, the said articles were kept as 'muddamal' articles along with the investigation papers. Thereafter, the P.S.I. prepared a list of items for the purpose of sending the same to F.S.L. for analysis. The same was sent along with a forwarding letter. On receipt of the same, the F.S.L. issued the Report after necessary examination.

2.4 At the end of investigation, the P.S.I. submitted charge-sheet in the Court of learned Judicial Magistrate, First Class, Unjha and as the charges against the appellants were exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Unjha committed the case to the Sessions Court, Mehsana. On receiving the same, it has been numbered as Sessions Case No. 27 of 1997 and it was handed over to the learned Addl. Sessions Judge, Mehsana, Camp – Patan for the purpose of disposing of the same on merits.

2.5 On production of the appellants, the learned Addl. Sessions Judge framed the charge and as the appellants did not plead guilty to the said charges, trial was conducted. To prove the guilt of the appellants, the prosecution has examined the following witnesses, which are as follows;

- PW – 1, Dr. Jaishreeben Khushalbhai Patel at Exhibit – 7 is the Doctor who has performed the Post-mortem of the dead body of the deceased on 28.09.1996 between 8.30 a.m. – 9.30 a.m. and also prepared the PM Note at Exhibit – 8 along with the Injury Certificate.

- PW – 2, Mafatlal Maganlal Toori at Exhibit – 13 is the Circle Inspector who has prepared the map of the scene of offence at Exhibit – 15 on the basis of the 'Panchnama' of the scene of offence.

- PW – 3, Naginbhai Malabhai Chamar at Exhibit – 16 is the complainant as well as an eye-witnesses of the incident and the person who immediately took the victim to Cottage Hospital, Unjha.

- PW – 4, Bharatkumar Naginbhai Chamar at Exhibit – 18 is the Son of PW – 3 and the other injured eye-witness.

- PW – 5, Natthekhan Kesar Khan at Exhibit – 19 is the police official who was discharging his duties as P.S.O. of Unjha Police Station on 27.09.1996. He had received the telephonic 'wardhi' and registered the same in the Station Diary at Exhibit – 20 and has also produced and proved the same by way of copy at Exhibit – 21. He has registered the complaint at Exhibit – 17 and also handed over the investigation to P.S.I. Mr. Patel by way of Report at Exhibit – 22.

- PW – 6, Hansaben Hargovinbhai, Exhibit – 23 is the wife of appellant no. 2.

- PW – 7, Jivrambhai Dhanjibhai at Exhibit – 24 is a 'panch' witness through whom the prosecution has tried to prove the 'Panchnama' of the scene of offence at Exhibit – 25.

- PW – 8, Naginbhai Alabhai Parmar at Exhibit – 26 is the other 'panch' witness of the scene of offence at Exhibit – 25.

- PW – 9, Lilaji Javanji Thakore at Exhibit – 27 is one of the 'Panchas' of 'Panchnama' at Exhibit - 28.

- PW – 10, Jagdishgiri Manorgiri Goswami at Exhibit – 29 has produced the 'muddamal' - knife and "rampuri chappa" at the relevant point of time in the Police Station but, has not supported the prosecution case.

- PW – 11, Becharbhai Madhavdas Patel at Exhibit – 31 is the witness when the seizure of 'muddamal' articles, i.e. knife and clothes of the accused persons was done.

- PW – 12, Shivabhai Jovabhai Solanki at Exhibit – 32 had seized the shirt which was worn by the deceased at the time of the incident.

- PW – 13, Somabhai Pitambardas Parmar at Exhibit – 34 is the 'panch' witness who has seized the other clothes that were worn by the appellants by way of 'Panchnama' - Exhibit – 35.

- PW – 14, Prahladbhai Kacharabhai at Exhibit – 36 is the 'panch' witness who has seized the knife and "rampuri chappa" produced by the appellants and the same have been proved by him at Exhibit – 37.

- PW – 15, Javanji Shankarji Thakore at Exhibit – 38 is the 'panch' witness of the 'Panchnama' at Exhibit – 37.

- PW – 16, Kantibhai Purshottamdas Patel at Exhibit – 39 is the Investigating Officer.

3.0 Over and above, the prosecution has also produced and placed reliance upon the documentary evidence along with the list produced vide Exhibit – 6, which is as under ;

1. Reporting about further investigation after registration of the complaint.
2. Complaint filed by Naginbhai Malabhai Chamar.
3. 'Panchnama' of the complainant, knife and the clothes wore by him at the time of the incident.
4. Inquest 'Panchnama'.
5. 'Panchnama' of the shirt wore by deceased –

Somabhai at the time of the incident.

6. 'Panchnama' of the scene of offence.

7. 'Panchnama' of the clothes on the dead body.

8. 'Panchnama' of the weapons.

9. Inland letter written by the accused.

10. Post-card written by the accused.

11. Post-card written by the accused.

12. Post-mortem Note.

13. Medical Certificate of Bharatbhai Naginbhai.

14. Medical Certificate of Khemabhai Virabhai.

15. Entry in the Station Diary.

16. Entry in the Telephone Register.

17. Entry in the General Register of the Police Station.

18. Judgment passed in Sessions Case No. 17 of 1967.

19. Entry about the despatch of 'muddamal' articles.

20. Receipt of the F.S.L. about acceptance of the 'muddamal' articles.

21. Forwarding letter of the F.S.L.

22. F.S.L. Report.

23. Serology Report of the F.S.L.

24. Report of the Physics Division of the F.S.L.

25. Public Notice.

26. 'Marnottar' Form.

27. Copy of the complaint filed by Khemabhai Virabhai.

4.0 On submission of the closing 'purshis' at Exhibit – 51, the learned Addl. Sessions Judge recorded further statement of the appellants u/s. 313 of the Code of Criminal Procedure, 1973 and after giving an opportunity of hearing to learned counsel for the respective parties, the learned Addl. Sessions Judge delivered the impugned judgment and convicted the appellants as stated hereinabove. Hence, this Appeal.

5.0 We have heard Ms. Banna Dutta learned counsel for the appellants and Shri H. L. Jani learned APP on behalf of respondent - State.

6.0 The main contention raised by learned counsel for the appellants is that the deceased had illicit relations with the wife of appellant no. 2, on account of which frequent arguments / quarrels used to take place in the family of appellant no. 2. For the said reason, the wife of appellant no. 2 was also sent to her parental home. It is contented that on the date of the incident, while the appellants were sitting in front of their house, at that

time, the deceased came there and picked up a fight with the appellants by using deadly weapons and in that process, both the appellants as well as the deceased suffered severe bodily injuries. Therefore, according to learned counsel for the appellants, this is not a case wherein the appellants were the aggressor but, the incident had taken place while the appellants tried to exercise their right of self-defence.

6.1 It has been contented by learned counsel for the appellants that on the basis of the evidence on record and the plea raised by the appellants in their further statement as well as the findings recorded by the Court below that appellant no. 2 at the time of the alleged incident was suffering from partial paralysis, the Court below ought not to have convicted the appellants for the offence in question since the same is contrary to the evidence on record.

6.2 Learned counsel for the appellants has further contented that the witnesses are interested witnesses since they are relatives of the deceased and, therefore, their depositions cannot be said to be reliable. Learned counsel has contented that since the incident has taken place during night hours and

there was no light, it is highly improbable to come to a conclusion that the appellants had committed the said act and also to assign their respective roles in the commission of the said offence.

6.3 Lastly, learned counsel for the appellants has contented that at the most the incident in question can be said to have taken place as a result of a free fight and that there was no motive on the part of the appellants to commit the crime in question. Therefore, according to learned counsel for the appellants, the appellants are required to be acquitted from the alleged offence. No other contentions have been raised by learned counsel for the appellants.

7.0 Learned APP has taken us through the entire oral as well as documentary evidence on record and, more particularly, through the evidence of two star eye-witnesses, i.e. Naginbhai Malabhai Chamar and Bharatbhai Naginbhai Chamar, as also the evidence of the wife of appellant no. 2. It has been contented that the presence of the accused at the scene of offence, the fact that both the appellants as well as the deceased belonged to the same community and also resided in the same locality and that Bharatbhai Naginbhai Chamar

sustained bodily injuries on account of his intervention in the scuffle clearly goes to show that this is a case wherein the prosecution has proved the guilt of the accused beyond reasonable doubt. Therefore, it is submitted that this is a fit case wherein the Appeal is required to be dismissed and the impugned judgment is required to be confirmed.

8.0 For the purpose of deciding this Appeal, we have taken into consideration the evidence of two star eye-witnesses as well as the evidence of the wife of appellant no. 2. The complainant – Naginbhai Malabhai Chamar has been examined by the prosecution as PW – 3 at Exhibit – 16. The said witness has categorically deposed before the Court below that on the date of the incident, he along with his son – Bharatbhai Naginbhai Chamar, his deceased – brother and mother – Champaben, were sitting in front of their house. At that time, his deceased – brother went out and while he reached near Chamunda Chowk, the appellants assaulted him with deadly weapons, i.e. knife and "rampuri chappa" and inflicted several blows on the body of the deceased on account of which the deceased fell down.

8.1 PW – 3 has further deposed that on noticing the said

incident, he along with his son – Bharatbhai Naginbhai Chamar, ran to the scene of offence and, thereafter, tried to intervene in the scuffle. During that process, Bharatbhai Naginbhai Chamar sustained bodily injuries at the hands of the appellants. The said witness has categorically deposed that the appellants, by using the said weapons, had inflicted about 10 – 12 blows on several parts of the body of the deceased and, thereafter, fled from the scene of offence on noticing that a crowd had started to gather at the said spot.

8.2 Thereafter, the deceased was taken to the Cottage Hospital at Unjha wherein, on examination, the deceased was declared as dead while, Bharatbhai Naginbhai Chamar was treated for his injuries. The said witness has also deposed that at the earliest he had registered the complaint - Exhibit – 17 before Unjha Police Station.

8.3 PW – 3 has further deposed that they could notice the said incident since a street-light in the area near to the place where the incident took place was on. He has identified both the accused in the Court and has categorically stated that 'muddamal' article no. 1 was in the hands of appellant no. 1 while

'muddamal' article no. 9 was in the hands of appellant no. 2. He has also identified that those were the weapons that were in the hands of the appellants at the relevant point of time and with which, the deceased was assaulted. The same facts have been narrated by him in the complaint filed by him at Exhibit – 17.

8.4 This witness has been thoroughly cross-examined by the learned Advocate for the appellants before the Court below but, nothing contrary has come out, which may shake his evidence.

9.0 Bharatbhai Naginbhai Chamar, the son of the complainant PW - 3, has been examined by the prosecution as PW – 4 at Exhibit – 18. This witness has also categorically deposed and narrated the same facts as has been deposed by PW – 3. He has also identified the appellants as well as the 'muddamal' weapons in the Court. It is required to be noted that this witness was seriously injured while he tried to intervene in the scuffle and had to be taken to the Cottage Hospital at Unjha for necessary medical treatment. His injury has been proved by the oral evidence of PW – 1, Dr. Jayshriben Khushalbhai Patel at Exhibit – 7 and by way of the Injury Certificate at Exhibit – 9.

10.0 Thus, from the depositions of these two witnesses and the medical evidence on record in the form of oral evidence of PW – 1 and the Injury Certificate at Exhibit - 9, the presence of both the appellants at the scene of offence has been clearly established and the same cannot be doubted by any stretch of imagination. Now, once it is established that the appellants were present at the place of incident, the next aspect that the Court is required to consider is to scrutinize their evidence, which they have narrated before the Police Station by way of police statement as also their depositions before the Court below *in toto*. The evidence on record is required to be scrutinized thoroughly and carefully and, if after scrutiny, the same is found to be trustworthy and free from doubt, then the Court can rely upon the same and conviction can be based on the same. Considering the entire evidence on record, we find no reasons to disbelieve the depositions of these witnesses. Therefore, only for the reason that the witnesses are the relatives of the deceased, their evidence could not be ignored or discarded.

11.0 We have also considered the evidence of the wife of appellant no. 2 as PW – 6 at Exhibit – 23. She has deposed that

appellants no. 1 and 2 were suspicious about her character and they believed that she had illicit relations with the deceased. However, in her cross-examination, nothing incriminating has come out. From the evidence of this witness, it is clearly established that there was motive behind the commission of the offence in question. Thus, the aspect of motive does not have much weight in this case.

12.0 Over and above, from the F.S.L. Report at Exhibit – 45 and the Serological Report at Exhibit – 46, it is evident that both the weapons, i.e. knife and "rampuri chappa" that were seized as 'muddamal' articles no. 1 & 9, were having human blood stains with Blood Group 'A' and that the Blood Group of the deceased was also 'A'. It is also established from the document at Exhibit – 46 that the control mud at the place of incident was also having human blood with Blood Group 'A'. The Shirt, pants and nicker, i.e. 'muddamal' articles A to D also had patches of human blood with Blood Group 'A'. The evidence in the form of Report of the F.S.L. and the 'Panchnama' lead us to believe that the clothes were torn on account of the blow of the 'muddamal' weapons. Apart from that the clothes that were worn by the appellants at the relevant point of time were also having human blood with Blood

Group 'A'. All these factors clearly connect the appellants with the crime in question.

13.0 The prosecution has examined Dr. Jayshreeben Khushalbhai Patel as PW – 1 at Exhibit – 7 in order to prove the aspect of homicidal death. From the evidence of this witness, the prosecution has proved the PM Note at Exhibit – 8 and the Inquest 'Panchnama' at Exhibit – 28. It is also established from the evidence of this witness that the deceased had nine external marks of injury, which she has narrated in her PM Note at Column no. 17 and the corresponding injury in Column no. 20 of the PM Report. She has categorically deposed that all the injuries were anti-mortem and that such injury could take place by the use of 'muddamal' articles no. 1 & 9. Thus, we are of the opinion that the prosecution is able to establish beyond doubt that the death was a homicidal death. Even learned Advocate for the appellants has not disputed the said fact and, therefore, we are not discussing the said aspect in detail.

14.0 So far as the contention raised by learned Advocate for the appellants with respect to the physical condition of appellant no. 2 is concerned, it may be noted that from the

evidence on record as discussed hereinabove, it is clearly established that appellant no. 2 had taken active part in the commission of the offence in question. Therefore, even if it is true that appellant no. 2 was suffering from partial paralysis at the relevant point of time, then also the same would not absolve appellant no. 2 from his guilt in view of the evidence on record. Thus, the active involvement of appellant no. 2 in the crime in question has been established beyond doubt.

15.0 From the Records & Proceedings, it is reflected that earlier also appellant no. 1 was involved in the serious offence of 'murder' and was convicted for life by the District & Sessions Court, Mehsana in Sessions Case No. 17 of 1967 vide judgment and order dated 06.05.1967. However, in spite of that, appellant no. 1 has again committed a similar offence, which leads us to believe that he is a head-strong person.

16.0 Thus, looking to the gravity of offence and the manner in which the same was committed, we are of the considered opinion that the Court below was completely justified in convicting the appellants for the offence in question. We are in complete agreement with the reasonings given by and the

findings arrived at by the Court below in the impugned judgment and, hence, find no reasons to interfere with the same. Thus, the Appeal deserves to be dismissed.

17.0 For the foregoing reasons, the Appeal is dismissed. The impugned judgment and order dated 5th March, 1998 passed by the learned Addl. Sessions Judge, Mehsana, Camp - Patan in Sessions Case No.27 of 1997 is confirmed. Appellant no. 1 is on temporary bail while appellant no. 2 is on regular bail and, therefore, their bail bonds are ordered to be cancelled. Both the appellants are directed to surrender to custody on or before *22nd October, 2007*.

(R. P. Dholakia, J.) (K. S. Jhaveri, J.)

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